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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1931.

No. 263.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

vs.

CLARENCE BEZUE.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1931.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner, vs. CLARENCE BEZUE,	No. 263.

Brief in Opposition to Petition for Writ of Certiorari.

I.

The Opinions of the Courts Below.

The New York Court of Appeals opinions are reported in 257 N. Y. 480 (R., 511-519).

The New York Appellate Division, Second Department, wrote no opinion. Its memorandum decision is reported in 232 N. Y. App. Div. 840 (R., 508).

The Trial Court (Mr. Justice John E. Mack) wrote no opinion (R., 500).

II.

Jurisdiction.

The plaintiff below does not contend that this Court is without jurisdiction to review the judgment herein. The sole question is whether or not this is a case in which this Court should exercise its supervisory powers to review the judgment below.

III.

Statement of the Case.

This action was instituted to recover damages for personal injuries, under the Federal Employers' Liability Act (Act of Con., April 22, 1908, C. 149, Sec. 1, 35 Stat. 65, and Act of April 5, 1910. C. 143, Sec. 1, 36 Stat. 291).

The issues came on for trial before Mr. Justice John E. Mack and a jury sitting in the New York State Supreme Court, Putnam County, on September 4th, October 2nd, 3rd, 9th and 10th, 1930, and resulted in a verdict for the plaintiff in the sum of $60,000 (R., 1,453).

The Appellate Division of the New York Supreme Court, Second Department, directed that unless the plaintiff stipulate to reduce the verdict to the sum of $50,000, in which event the judgment and order appealed from were unanimously affirmed (232 N. Y. App. Div. 840) that the judgment and order be reversed upon the law and facts and a new trial granted. The plaintiff stipulated to accept this reduction (R., 1,503-507), and the judgment as so modified was unanimously affirmed.

The defendant as matter of right then appealed to the New York Court of Appeals, and that Court af-

firmed the judgment and order of the Appellate Division (257 N. Y. 480; R., 520-521) and the judgment and order herein sought to be reviewed were thereafter entered on the 2nd day of June, 1931 (R., 520-521).

* * * * * * *

Plaintiff, a married man, 31 years old, had been engaged in the labor gang at defendant's maintenance roundhouse at Maybrook, N. Y., for a period of approximately a year, first as an engine wiper, and then at times operating a portable electric truck, and working as a member of defendant's unskilled labor-gang at this maintenance roundhouse.

On September 2, 1929, plaintiff was injured while he was helping to roll a pair of wheels belonging to defendant's engine No. 3221, which had been for two years exclusively used in interstate commerce (R., 289-291) and which engine could not get back to defendant's main line in New England without being in interstate commerce, whether it ran light, hauled a train; or was hauled (deadheaded) over the New York-Connecticut State line, and which engine actually continued in interstate service two days after the accident (R., 289-291) and has continued ever since in such service, because it was of the 2-10-2 Sante Fe type used for freight service only in heavy cross-mountain interstate trips between Maybrook, N. Y. and points in Connecticut (R., 269, 294) and which engine at the time of the accident was undergoing a statutory boiler wash (R., 270) and in service maintenance repairs (R., 245) of which the moving of the wheels was an incident (R., 338). Plaintiff was thrown over the journal of said wheels on his back on the hard packed cinders between the tracks when the foreman without warning kicked a block from under the wheels, causing them to roll towards plaintiff.

We will not further refer to the undisputed facts because to do so would require their being set forth prac-

tically verbatim." We have, however, marshalled such facts in their proper place under the title "Argument" in this brief.

IV.

Specifications of Errors.

The Trial Court, the Appellate Division and the New York Court of Appeals all held that the plaintiff, as matter of law, was engaged in interstate commerce at the time he was injured.

The Trial Court so concluded for the reason that it considered this engine No. 3221 was an instrumentality of interstate commerce and not withdrawn from such commerce. The Court of Appeals, in its opinion, stated affirmatively that it considered it unnecessary to decide this question because it held that, upon the undisputed evidence, plaintiff was a plant service employee, engaged in the defendant's maintenance roundhouse, and that his service to defendant involved constant interstate commerce maintenance repair and inspection, and that he therefore was at all times necessarily engaged interstate commerce.

As heretofore stated, the Appellate Division did not write any opinion.

The record presents no disputed evidence as to the plaintiff's work, and no divergent inferences are deducible from the evidence; and, therefore, it was surely a matter of law as to whether or not he was engaged in interstate commerce, and, as long as such evidence clearly showed that the plaintiff was engaged in interstate commerce, it is immaterial upon what theory of law the various Courts herein have based their respective decisions. (*D. L. & W. R. R. Co.* v. *Yurkonis*, 220 Fed. 429, page 433, Ward, *J.*: "We think this was a

right conclusion for the wrong reason." Writ of error dismissed, 238 U. S. 439) and such differences of opinion certainly should not constitute a reviewable question, if plaintiff below was, in the opinion of this Court, actually engaged in interstate commerce, as matter of law, even, if for reasons not found by the Courts below.

V.

Argument.

A.

The evidence established that the plaintiff below was engaged in interstate commerce as matter of law because the essential facts of his general employment at the time of his injury are undisputed and indisputable.

B.

He was an unskilled laborer, plant service employee, at defendant's maintenance roundhouse, engaged in his general unassigned work so closely related to interstate commerce as to be a part of it (*N. Y. C. R. R. Co.* v. *Marcone*, 281 U. S. 345; *Erie R. R. Co.* v. *Collins*, 253 U. S. 77; *Erie R. R. Co.* v. *Szary*, 253 U. S. 86; *Illonardo* v. *Erie R. R. Co.*, 103 N. J. L. 4; *Salvo* v. *N. Y. C. R. R. Co.*, 216 N. Y. App. Div. 592; *Matter of Guida*, 183 N. Y. App. Div. 822, aff'd. 224 N. Y. 712; *Hiser* v. *Davis*, 234 N. Y. 300).

C.

He was engaged in aiding to maintain in efficient condition as part of his general

maintenance and plant service, for effective use, a locomotive used exclusively in interstate commerce while it was undergoing a statutory boiler wash and incidental maintenance repairs (*Lusk v. Bandy*, 76 Okla. 108).

D.

He was engaged in aiding to maintain in efficient condition for effective service in interstate commerce a locomotive which in this particular case was an instrumentality of interstate commerce not withdrawn from such commerce (*Oglesby* v. *St. Louis & S. F. R. R. Co.*, 218 Mo. 79; certiorari denied 277 U. S. 587; *Flack v. D. L. & W. R. R. Co.*, 45 Fed. (2) 683, certiorari denied.

Bezue was an unskilled laborer engaged in defendant's maintenance roundhouse (R., 175-279, 147-148, 335) located at the west end (70 miles across the New York-Connecticut State line, R., 311) of defendant's system and its only interstate commerce route from its main line and branches in New England to New York and was thus at all time an interstate commerce employee.

He "was engaged in a plant service," as the New York Court of Appeals said (R., 513). An almost similar expression to *petitioner's admission* in its brief in the New York Appellate Division (232 N. Y. App. Div. 840) at Page 21, "In substance it was plaintiff's work to keep locomotives in good repair."

What locomotives? Freight locomotives, used in petitioner's cross-mountain, New York-Connecticut, inter-

state service, since, only one or two smaller locomotives were used in a passenger service of one train daily between Maybrook and Poughkeepsie, N. Y. (Plaintiff's Exhibit 15A, 15B, 16, R., 464-470; R., 149, 267, 271-273, 280).

This Maybrook, N. Y., maintenance roundhouse was for the stabling and daily maintenance of such freight locomotives during daily inspection and maintenance up-keep; and their regular thirty day statutory boiler washes and maintenance up-keep, whereas for their complete overhauling, rebuilding and general repair work at the end of approximately every eighteen months or after the locomotive had accumulated approximately 35,000 miles of service the petitioner maintained at Readville, Mass. a general out-of-service repair shop (R., 245-246, 337-339).

This arrangement, we believe, to be identical with the situation arising in *Oglesby* v. *R. R. Co.*, 218 Mo. 79, certiorari denied 277 U. S. 584, where the Missouri Court emphasized the fact, that the repairs were made in a roundhouse where maintenance repairs were made, and that the railroad company maintained a repair shop at a distant point where *general, extensive and heavy repairs and alterations were made.*

The evidence in the case at bar established *that no complete dismantling or general, or out-of-service repair jobs were done at Maybrook, N. Y.* (R., 246).

What were plaintiff's general duties in this maintenance roundhouse?

At times he operated a small portable electric truck with a crane (R., 470) made himself generally useful about the premises, either with the truck and crane or in person, in aiding or personally doing general maintenance work in oiling locomotives; pulling down grease boxes and getting grease; and greasing the locomotives;

adjusting couplers; adjusting brake shoes; pressure tanks; taking driving shafts off, and putting them on; keeping locomotives continually in service in interstate commerce; pulling up springs; oiling springs; greasing collars; fixing draw-bars; changing pumps and pilots; removing and replacing air-compressors and brackets and water pumps; bringing material to the engines for maintenance repairs, removing and replacing pistons from engine cylinders and any and all work required about this maintenance roundhouse on such engines in the unskilled labor class (R., 145-147; 151; 190-196).

His work required from 20 minutes to a few hours (R., 151).

He was regularly unassigned, day in and day out (R., 147-148) and was so employed up to and at the time of the accident, since unskilled labor was used in rolling wheels (the identical job plaintiff was doing when injured) putting things in position for mechanics, cleaning windows, operating coal pockets; dumping coal and running the turntable (R., 335).

In fact, plaintiff worked, day in and day out, on hot or live engines ready for use and actually used immediately thereafter (R., 147, 148, 152). This was admitted by the petitioner in the Court of Appeals (Appellant's Brief, Pages 20-21).

Under this uncontroverted evidence Bezue was engaged as an unskilled laborer in defendant's maintenance roundhouse at Maybrook, N. Y. in work so closely related to interstate commerce as to be a part of it.

Erie R. R. Co. v. *Winfield,* 244 U. S. 170.
St. Louis R. R. Co. v. *Seale,* 229 U. S. 156.
Erie R. R. Co. v. *Collins,* 253 U. S. 77.
N. Y. C. R. R. Co. v. *Marcone,* 281 U S. 345.
Erie R. R. Co. v. *Szary,* 253 U. S. 86.
Illonardo v. *Erie R. R. Co.,* 103 N. J. L. 4.

Knowles v. *N. Y., N. H. & H. R. R. Co.*, 223 N. Y. 513.
Hiser v. *Davis*, 234 N. Y. 300.
Matter of Guida, 183 N. Y. App. Div. 822, affm'd. 224 N. Y. 712.
Salvo v. *N. Y. C. R. R. Co.*, 216 N. Y. App. Div. 592.

What Bezue was actually doing at the time of his injury we believe is immaterial, *as he might have been doing nothing at all* and still have been engaged in interstate commerce as matter of law as this Court said in *N. Y. C. R. R. Co.* v. *Carr*, 238 U. S. 260, "The question is not to be decided by considering the physical position of the employee at the moment of the injury."

Aside from the question of Bezue's being engaged in interstate commerce, as matter of law, by reason of his general unassigned employment at defendant's maintenance roundhouse, he was engaged in interstate commerce by reason of the fact that he was actually doing work incident to the thirty day statutory boiler wash (R., 270, 248, 338).

The particular locomotive (No. 3221) had been, was and still is used exclusively in interstate commerce. From September 3, 1927 to the day of the trial October 10, 1930, except when undergoing general out of service repairs and practically reconstruction at Readville, Mass., from September 2, 1927, to October 11, 1927; February 15, 1929 to March 27, 1929; and June 3, 1930, to July 1, 1930 (Petitioner's stipulation, R., 289, 290, 291; Plaintiff's Exhibit A 14, B. C. R., 458-462).

This particular locomotive had undergone similar boiler washes while being used exclusively in the Maybrook, N. Y. and Connecticut freight service on November 14, 1927, January 23, 1928; February 25, 1928;

April 2, 1928; May 8, 1928; June 10, 1928; July 17, 1928; September 5, 1928; October 11, 1928; November 26, 1928; May 3, 1929; June 10, 1929; July 17, 1929, and the one at the time of this accident, August 24, 1929. All of which were at the petitioner's maintenance roundhouse at Maybrook, N. Y. (R., 337).

There was nothing unusual about this boiler wash as they usually took from 3 to 6 days or more (R., 245) the moving of the wheels was incident to the boiler wash (R., 338), and petitioner's general maintenance supertendent testified *that as a matter of fact there were other engines in for boiler washes where the repairs were heavier,* and that the repairs on 3221 were not exceptional but common to this thirty day boiler wash period (R., 339, 340).

Such testimony was to be expected as this particular locomotive had been practically rebuilt on its last trip to defendant's out-of-service general repair shop at Readville, Mass. between February 15 and March 27, 1929, and had had three boiler washes with maintenance repairs in the interim on May 3, June 10 and July 17, 1929.

An employee injured while making a boiler wash on a locomotive used exclusively in interstate commerce is engaged in interstate commerce (*Lusk* v. *Bandy,* 76 Okla. 108; 184 Pac. 144). Why should doing work incident to the boiler wash change the character of the employment?

While the New York Court of Appeals did not deem it necessary in deciding this case to consider the question of this particular locomotive's character as an instrumentality of interstate commerce not withdrawn from such commerce, we believe, that it was at the time of plaintiff's injury such an instrumentality because of its uninterrupted exclusive use, the defendant's abso-

lute inability to use said locomotive for any other kind of commerce because of its peculiar type and that the fact that no matter how said locomotive was taken back to its main line in the State of Connecticut it must either take part in an interstate commerce movement or be a part of it.

The testimony also showed *that no out-of-service repairs were made at Maybrook, N. Y.*, and were only made at Readville, Mass., so that we have an identical situation in the case at bar with *Oglesby* v. *R. R. Co.*, 218 Mo. 79, where this Court denied certiorari, 277 U. S. 587, and a very similar situation to the case of *Atkins* v. *Payne*, 109 Ka. 477, where this Court also denied certiorari, 257 U. S. 658.

We are not concerned here with many of the decisions of this Court following its pronouncements in *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353, where the opinion stated that "an engine as such is not permanently devoted to any kind of traffic, * * *. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen * * *."

Every case that we know of where this Court has rendered an opinion in relation to a locomotive as an instrumentality of interstate commerce has had in it facts justifying the conclusion that the locomotive might, although previously used in interstate commerce, be used in intrastate commerce on its next run after the accident.

There are no such facts in this record. In fact the facts are to the contrary. First, as to the peculiar type of locomotive. Second, as to its exclusive use for years before the accident, and as to its actual use after the accident, and third, the peculiar geographical situation of defendant's maintenance roundhouse being at the weste[illegible] end of its railroad system and only 70 miles

approximately from the New York-Connecticut State line prohibited this locomotive being anything else but an instrumentality of interstate commerce unless its services were completely dispensed with and they were not, as far as the record goes for on the date of the trial some 13 months after the accident it was still in this service.

As we understand the test laid down by this Court, it is that each case must be decided in the light of the particular facts proven with a view of determining interstate commerce, *N. Y. C. R. R. Co.* v. *Carr*, 238 U. S. 260, and we therefore will not discuss the cases cited in petitioner's brief believing them irrelevant because the questions here raised were not decided on anything like or near the *particular facts proven in the case at bar.*

D.

Petitioner's point B raises no question sufficient to warrant the granting of a writ of certiorari.

Petitioner has contended in the Courts below the same as here that plaintiff was not engaged in interstate commerce at all and yet tries to becloud the clear cut issue of law by suggesting "at the most the plaintiff presented a fact question which should have been submitted to the jury."

This argument has failed to impress any of the thirteen judges of the three courts below and we still believe it is absolutely untenable.

The fact that the judges of the various successive State courts may have differed in their reasoning as to the principle applicable does not cause a jury question to be presented. (*D. L. & W. R. R. Co.* v. *Yorkinus*, 220 Fed. 429, writ of error dismissed, 238 U. S. 439.)

Interstate commerce is never a question for the jury if the essential facts concerning employment are not in dispute, and admit no divergent inferences.

In such a case the Court is required to charge as to interstate commerce as matter of law.

N. Y. C. R. R. Co. v. *Portet*, 249 U. S. 168; *So. R. R. Co.* v. *Plunkett*, 244 U. S. 371; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303; *Pederson* v. *D. L. & W. R. R. Co.*, 229 U. S. 146.

Conclusion.

It is, therefore respectfully submitted that there is nothing shown by the petitioner in this case calling for the exercise by this Court of its supervisory powers to review the judgment of the Court of Appeals of the State of New York and petitioner's application for a writ of certiorari should be denied with costs.

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